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No. 82-1086

In The

Supreme Court of the United States

October Term, 1982

DAVID H. GROOM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Was the evidence presented at trial sufficient as a matter of law to support the jury's verdict of guilty in a situation where the critical issue of the petitioner's criminal intent was conceded by the Government's expert witness to be a matter where reasonable tax experts could agree that petitioner's theory of tax deferral was both legal and proper?

2. Is a new trial warranted where there is substantial and credible evidence that the petitioner was prevented from testifying in his own behalf, because his trial counsel stated to him that he would seek to withdraw his representation of him if he took the stand over trial counsel's objection?

3. Is a new trial mandated by a denial of effective assistance of counsel in a situation where no defense testimony or evidence is offered at trial, despite the fact that (1) the petitioner insisted on testifying; (2) an expert accounting witness was interviewed and available to endorse the propriety of petitioner's tax deferral plan, and (3) numerous character witnesses could have been secured if trial counsel had chosen to utilize them?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

David H. Groom, the petitioner herein, prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 16, 1982 and November 8, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is not yet published. A copy of the court's judgment-order is attached as Appendix A. By order dated November 8,

1982, the United States Court of Appeals for the Third Circuit denied a petition for panel rehearing (Appendix B). The opinion of the United States District Court for the Western District of Pennsylvania has been neither published nor filed. On November 18, 1982, the United States Court of Appeals for the Third Circuit stayed its mandate until December 15, 1982, pending filing of this petition (Appendix C). A petition for a further stay of the mandate to December 24, 1982 was filed with the United States Court of Appeals for the Third Circuit on December 16, 1982 (Appendix D).

JURISDICTION

The judgment-order of the United States Court of Appeals for the Third Circuit was entered on September 16, 1982 (Appendix A). A timely petition for rehearing was denied on November 8, 1982 (Appendix B). The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Title 26, United States Code, §7206(2) (1970 ed.):

> "Any person who— . . .
>
> (2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim,

or document. . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852."

2. United States Constitution, Amendment Six:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

3. United States Constitution, Amendment Five:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioner, David H. Groom, was charged in a sixteen-count indictment with advising the preparation of false and fraudulent tax returns in violation of 26 U.S.C. §7206(2) (1970 ed.). Petitioner asserted his innocence, and after an eight-day jury trial in the United States District Court for the Western District of Pennsylvania, he was adjudged guilty of all sixteen counts in a verdict that was rendered on October 2, 1981. Execution of a two-year prison sentence and a $16,000 fine has been stayed pending appeal.

Petitioner was a certified public accountant and a professor of accounting during the period in question, taxable years 1974 to 1977, inclusive. Mr. Groom had a great deal of experience with the coal industry, and had served as an accountant for several of the coal companies in the area, including a firm owned and operated by Kenneth C. and John T. Harmon.

John Harmon contacted petitioner in early 1974, and consulted with him as to the possibility of devising a tax plan whereby his coal company could secure some federal tax relief from what was anticipated in early 1974 as a period when the coal producers would enjoy short-lived, but inordinately high incomes. Petitioner set out to come up with such a plan. He contacted a highly respected accounting firm in Pittsburgh, discussed the issues with a tax lawyer from Philadelphia, and personally conducted almost three weeks of "non-stop" research on the problem.

The result of his efforts was a plan whereby a coal company would defer reporting receipts as income by diverting those receipts to a coal brokerage firm. The firm would redistribute the receipts to the coal companies, at which time the redistributed receipts would be reported as income for the taxable year in which they

were received from the brokerage firm. The coal brokerage firm was an independent business entity that was actively involved in investing the funds that it received. Neither the coal companies nor its managerial personnel had any role in the operation or management of the coal brokerage firm.

The coal brokerage frim which was to serve as the necessary conduit was formed in 1974 by the petitioner, and was named "B & G Coal Company". Mr. Groom was the sole director and manager of the company, as those who used the company for tax deferral purposes had no imput into its operation. Petitioner contracted with the Harmon Mining (Coal) Company, John T. and Deloras C. Harmon, Kenneth C. and Shirley M. Harmon, and Thomas F. and Shirley Huff to utilize his firm as a "tax shelter" for tax years 1974 to 1977. His advice and activities, relative to these individuals' use of his "tax shelter" and the subsequent income tax returns they filed, represented the substance of the Government's criminal charges against him.

There has never been any contention by petitioner that he did not form the coal brokerage firm, or that he did not advise his clients to use the firm to defer some portion of their federal tax liability. As a matter of fact, the essence of petitioner's defense at trial was that he did everything that the Government alleged that he did, with the critical exception of acting with the knowledge that the tax return information was false and his advice was fraudulent. Thus, the operative issue in this case is whether petitioner's use of his "tax shelter" was employed with the intent to defraud the Government because of his awareness that his tax deferral plan was illegal, or whether he acted on the basis of a sincere belief that he had devised a novel, but lawful, plan which would afford some tax relief for his beleaguered coal producing clients.

The record makes it clear that everything that was done by petitioner in connection with his coal brokerage firm was done openly and publicly, and with the full knowledge and consent of his tax clients. As a result, the Government's argument as to his intent and the state of mind that accompanied it is premised on the supposed clarity of the federal tax law as it relates to the subject of "constructive receipts". That premise, however, was contradicted at trial by the Government's own expert witness, Special Agent Gloekler, who testified as follows:

> "[MR. RUTTER:]
>
> Q. Agent Gloekler, perhaps we can simplify this portion of your examination by asking you this question and getting your answer: You have expressed an opinion concerning the reportability of Harmon of the checks to B & G. Would you concede for me, sir, that there are those who might have a difference of opinion on that subject with you? A. Based on the testimony that I heard, sir, that was my opinion based on the testimony and the records that have been admitted into evidence.
>
> Q. I understand that is your opinion. All I am asking you: Would you agree with me that there are those who might hold a different opinion? A. Possibly, yes, sir.
>
> Q. That is say, this is a matter of difference of opinion between people of equal expertise? A. Might well be, yes, sir. . . . [District Ct. Tr. Transcript, pp. 31a-33a].

* * *

Q. Okay. All I am saying to you, Agent Gloekler: The opinions you expressed about when you report a check and what are receipts to whom, they are things that you have an opinion about, yes? A. Yes, sir.

Q. But people with equal competence and equal training could have a difference of opinion, couldn't they, sir? A. Yes.

Q. Neither one of you is wrong in a way that make you go to jail, are you? A. No, sir.

Q. Suppose you were wrong on the question, would you think you should go to jail for being wrong in your opinion? A. No, sir. . . ." (District Ct. Tr. Transcript, p. 33a).

Under all of the above circumstances, the petitioner's testimony as to the nature of his research, the content of his conversations with other tax experts, the reasoning that led him to his conclusions about the tax shelter in question, and his state of mind from 1974 to 1977 would have been critically beneficial and unquestionably relevant. Though some of these points were touched upon at trial by way of cross-examination of Government witnesses, there was simply no way that the above matters could have been fully presented to the jury without the petitioner taking the stand.

Despite all of the above, when petitioner reiterated his desire to testify after the Government had completed its case, trial counsel insisted that he not take the stand. Petitioner asserts that when he persisted with his request to testify, trial counsel told him that he did not want him to take the stand. Moreover, trial counsel warned him that if he attempted to take the stand, over his

objection, he would petition the court to withdraw as his counsel. Petitioner asserts that he was convinced that trial counsel's request would be granted, which would have left him in the position of having to represent himself in the midst of trial. Petitioner did not wish to act as his own counsel, so he relinquished his right to testify.

Petitioner's allegations, in this regard, are supported by his wife, who was a party to the conversations between himself and trial counsel. Her statement is contained in an affidavit which is designated Appendix E.

It should also be noted that though the record does not contain any verification of petitioner's account of trial counsel's "warning" or "threat", it does conclusively establish that petitioner's failure to testify was the result of a decision by trial counsel:

> "Likewise, you see, it becomes especially important in this case because I made a judgment which you heard when I stood up over there this morning, a judgment not to put David Groom on the witness stand. I will not discuss with you the reasons that I had in mind in making that decision, but I will draw this to your attention: Judge Cohill will tell you as a matter of law that you are not to draw any inferences or any conclusions from the fact that Mr. Groom did not take the witness stand. And he will also tell you, I believe, as a matter of law, that a defendant may rely on the evidence brought out in cross-examination of witnesses for the government. That is my judgment. Don't hold that against David Groom in any way. My judgment." (District Ct. Tr. Transcript, p. 34a).

In addition to the failure (or rather, refusal) of trial counsel to call petitioner as a witness, he also failed to call a certified public accountant, Mr. Anthony Zukauckas, who had reviewed petitioner's "tax shelter" theory, and was ready and able to offer his expert opinion as to the soundness of that theory. This witness was made known to trial counsel, and he was even interviewed by him. Nevertheless, he was not called as a witness, in spite of the fact that he was physically present at the trial on numerous occasions.

There were also a number of character witnesses that were suggested to trial counsel by petitioner. However, for some inexplicable reason, none of these witnesses were called upon to testify.

This situation is all the more onerous when one considers the fact that the conclusion of the Government's case, trial counsel rested on behalf of the defense without calling any witnesses or attempting to introduce any type of evidence whatsoever. Thus, in a case where a key Government's witness conceded that a legitimate difference of opinion could exist as to the critical issue of the propriety of petitioner's tax shelter plan, he was precluded from presenting any evidence to the jury that would have bolstered his claim that his tax advice was given without any criminal intent.

On the appeal which was filed by trial counsel, a panel of the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court, and held that the evidence presented at trial was sufficient, as a matter of law, to support the jury's verdict of guilty (Appendix A). By the time the petition for rehearing was filed with the Third Circuit Court of Appeals, petitioner was represented by present appellate counsel.

The petition for rehearing was grounded upon two contentions: (1) that the petitioner was unconstitutionally prevented

from testifying at trial on his own behalf because of the threats of trial counsel, and (2) that trial counsel was ineffective for failing to call any witnesses or present any evidence for the defense where there were witnesses who were ready and able to offer significant testimony. The Court of Appeals denied the petition for rehearing on the grounds that it raised issues not presented to the District Court (Appendix B). That fact was conceded in the petition itself, but it was petitioner's contention that such issues could not possibly have been raised in the District Court or in the original appeal, because his trial counsel could not and would not make such an argument against himself. Nonetheless, the Court of Appeals did stay its mandate pending the filing of petition (Appendix C).

REASONS FOR GRANTING THE WRIT

I.

The evidence presented at trial was not sufficient as a matter of law to support the jury's verdict of guilty where the Government's expert witness conceded that the propriety and legality of petitioner's tax deferral theory was one that could be supported by tax experts.

It is axiomatic that the standard of review to be applied by this Court in reviewing the sufficiency of the evidence is whether there is sufficient record evidence such that a rational trier of fact could find proof of guilt beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 324 (1979); *Gov. of Virgin Islands v. Christensen,* 3rd Cir. No. 80-2525 Slip Op. filed March 16, 1982. *See generally, Glasser v. United States,* 315 U.S. 60 (1942).

The petitioner recognizes that in attacking the sufficiency of the evidence following a jury's verdict of guilty he has a heavy burden, *United States v. Kates,* 508 F. 2d 308, 310 (3rd Cir. 1975), and that the court must view the evidence in a light most favorable

to the prosecution, *United States v. Klein,* 515 F. 2d 751, 753 (3rd Cir. 1975), *United States v. DeCavalcante,* 440 F. 2d 1264, 1273 (3rd Cir. 1971). The courts acknowledge, however, that a "mere modicum" of evidence is insufficient to support a guilty verdict, *United States v. Marolda,* 648 F. 2d 623, 624 (9th Cir. 1981), *citing Jackson v. Virginia, supra,* 443 U.S. at 319; and the cases further require the appellate court to judge whether "reasonable minds could have found the evidence inconsistent with every reasonable hypothesis of the defendant's innocence," *United States v. Ocanas,* 628 F. 2d 353, 360 (5th Cir. 1980), *reh. denied,* 633 F. 2d 582, *cert. denied,* 101 S. Ct. 2316 (1981). Measured against these standards, the trial evidence was legally insufficent and this Court should therefore reverse the judgment of conviction and remand the case to the District Court with instructions to enter a judgment of acquittal.

It was established at trial that David Groom is a certified public accountant who, throughout the period of the indictment years and before, maintained an office for private practice of public and tax accounting. He also taught accounting at Indiana University of Pennsylvania located in Indiana, Pennsylvania. In addition to his accounting practice and his teaching responsibilities, he was involved in various businesses, many of them related to the coal industry. For example, he was the owner of B & G Coal Company, an entity extensively involved in the instant case, and was the incorporator of several other coal companies and coal-related businesses which are not involved in this matter (12a-18a).

The petitioner first met John Harmon, one of the principal characters in this saga, in approximately 1971 or 1972 in connection with Mr. Groom's representation of people leasing a piece of property to John Harmon (18a). Thereafter, John Harmon, chief executive officer of Harmon Coal Corporation, retained David Groom to advise him with respect to state corporation taxes. Through Mr. Groom's efforts with the state corporate tax officials,

John Harmon received a refund of approximately $87,000 of a total $110,000 which had previously been paid (19a-20a). Approximately at that same time, the petitioner became the administrator of Sam Harmon's estate. Sam Harmon was John Harmon's brother who was killed in an airplane crash (20a). Through these associations, the petitioner became the accountant for the Harmon mining interests.

The year 1974 was an excellent financial year for coal producers, as the increased demand for coal resulting from the oil shortage drove prices up. In approximately March or April of that year John Harmon consulted his accountant, the petitioner David Groom, and asked him whether he knew of any way to defer paying taxes because 1974 promised to be such a good year (21a). The petitioner did not immediately respond to this request for advice. Instead, he advised John Harmon that he would have to research the matter and get back to him.

Although the petitioner was not permitted to testify at trial, his secretary of many years provided the jury with substantial insight into this research which he had promised Mr. Harmon he would do. The petitioner instructed his secretary that he would not take any telephone calls and he locked himself in his office for approximately three weeks. Although his secretary Linda Ribbeck could not testify as to the exact course of his research, she was at least able to describe the then existing state of affairs. The petitioner was "literally surrounded" by volumes of tax books (24a). The tax materials available to Mr. Groom, in his office, included Prentice-Hall, CCH and the Research Institute of America. At the end of this three week period of time, he announced to Ms. Ribbeck "I think I am on to something. I think I have something here. I want to check it out first" (25a). He then instructed his secretary to telephone a CPA at the Pittsburgh office at Peat, Marwick & Mitchell, a large, national accounting

firm and had a discussion. Thereafter, he spoke by telephone with tax attorney David Wasserstrom of Philadelphia (25a-26a).

At the end of this intensive research effort, David Groom went back to John Harmon, recounted some of his research efforts, and advised that he had set up a brokerage company into which the coal receipts could be paid so that there would not be any tax due from the coal producer at that time (21a-23a). When the coal receipt money would be paid from the brokerage firm, B & G Coal Company, to the Harmon mining interests, Harmon Coal Company or Harmon Mining Company, then the income would be recognized for tax purposes by being entered into the books and records of the Harmon businesses as coal sales (26a).

The petitioner was charged in sixteen counts with willfully advising the preparation of false or fraudulent individual and partnership tax returns for the years 1974 through 1977 in connection with John Harmon, Ken Harmon, Harmon Mining Company, Harmon Coal Company and Thomas and Shirley Huff. There was no dispute at trial that Mr. Groom had in fact given the advice pertinent to the preparation of the tax returns and had in fact prepared the tax returns specified in the indictment. The tax returns at issue were prepared in accordance with the advice that petitioner first gave to John Harmon and later gave to Thomas Huff in 1974. That is, the receipts which were reported on the tax returns were only those receipts actually received by the taxpayers and did not include those receipts which were received by B & G Coal Company but not actually turned over to the taxpayers.

According to the Government's trial theory, this resulted in a significant underreporting of income for 14 of the 16 tax returns and, in the case of the Huffs, an overreporting of income for the tax years 1975 and 1976 when there was actually no coal sale

activity for the Huffs. In light of the petitioner's trial posture regarding his preparation of the returns specified in the indictment, the only issue at trial, and the only issue involved in this aspect of the appeal, was whether the petitioner's tax advice was willfully false and fraudulent.

The statute under which the petitioner was prosecuted, 26 U.S.C. §7206(2), provides:

> "Any person who . . . [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . .shall be guilty of a felony. . . ."

The word "willfully", as that word is used in the statute, connotes a voluntary, intentional violation of a known legal duty. The Supreme Court has formulated the requirement of willfulness as including bad faith or evil intent, evil motive and want of justification in view of all the financial circumstances of the taxpayer. *United States v. Bishop*, 412 U.S. 346, 360 (1973), *citing United States v. Murdock*, 290 U.S. 389, 398 (1933), and *Spies v. United States*, 317 U.S. 492, 498 (1943). As the Court elaborated in *Spies*,

> "It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." 317 U.S. at 496.

Section 451 of the Internal Revenue Code, 26 U.S.C. §451, provides:

> "The amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period."

In the 1973 edition of Prentice-Hall, Federal Taxes, paragraph 20,161, p. 20,151, it is stated:

> "Certain ideas circumscribe constructive receipt. The doctrine applies only where the taxpayer's control of with the item credited is unrestricted. Thus, a sum is not constructively received if it is only conditionally credited; or if it is indefinite in amount; or if the payor has no funds with which to pay the credits. . ."

Applying these principles to the case at hand, one can see that there are several reasons militating against constructive receipt by the taxpayers in the year coal sale proceeds were received by B & G Coal Company. The record is replete with evidence that petitioner, without authorization from the taxpayers, used substantial sums of money for his own purposes, or at least for purposes inconsistent with the understanding of the taxpayers. John Harmon testified on direct examination by the prosecution that he did not authorize B & G's expenditures to or investments in Pow-R-Tron (28a), Elaine Aire, Inc., Contact, Inc. (28a), Eastern Coal Resources, Eastern Deaton Coal Company (29a), Eastern-Plocus Resources, or petitioner's own personal expenditures. Accordingly, the trial evidence does not clearly show

that the B & G funds were immediately available to the taxpayers, and hence constructively received by them.

Perhaps the most revealing evidence that was offered at trial on the issue of the petitioner's state of mind in giving the tax advice that resulted in the preparation of the tax returns in issue was the aforementioned testimony of Special Agent Gloekler, one of the two investigating agents of the Internal Revenue Service. Agent Gloekler's testimony made it clear that even the Internal Revenue Service recognized the considerable latitude that existed in one's interpretation of such "terms of art" as "constructive receipt."

It is of course not unusual for the Internal Revenue Service and a taxpayer or tax advisor to have a difference of opinion regarding the proper interpretation and application of the Internal Revenue Code. Such disputes are regularly resolved by administrative procedures within the Treasury Department, by the Tax Court, by the District Courts, by the Courts of Appeals, and, even on occasion, by the United States Supreme Court. In this case the Government contends that the tax advice that petitioner gave was not only wrong, as a matter of law, but was given with such a pernicious intent that he should be subject to criminal penalties. As the above discussion indicates, however, this case actually involves nothing more than a frank difference of opinion between various knowledgeable people regarding the construction and application of the Internal Revenue Code, and should not even be the subject matter of a criminal proceeding.

Interestingly, it is not infrequent for the Internal Revenue Service itself to urge a particular construction of the tax laws, even after it has lost the same argument in other courts. The most recent example of such a situation in this Circuit appears in *Sun Company, Inc. v. Commissioner*, 3rd Cir. No. 81-1997, Slip Op. filed April 16, 1982. At issue in *Sun Company* was the deductibility

of intangible drilling and development costs in the context of offshore exploratory drilling. The Commissioner urged that a particular interpretation of the pertinent statute and its regulations, which interpretation had been rejected by the Tax Court on four separate occasions, not including the *Sun Company* case in the Tax Court. Slip Op. at 9. Notwithstanding the apparent "clarity" of the legal issue involved, the Commissioner assessed a deficiency and the taxpayer filed suit in the Tax Court and won, thus bringing to five the number of court decisions contrary to the Commissioner's interpretation. This Court agreed with the Tax Court and affirmed the lower court decision in the taxpayer's favor.

The foregoing analysis demonstrates that there was sufficient doubt regarding the reportability by the taxpayers in the year coal sale proceeds were received by B & G Coal Company, viewing the evidence in a light most favorable to the prosecution, that the Government failed as a matter of law to introduce sufficient evidence of the petitioner's "willfulness" in giving the above tax advice and preparing the tax returns consistent with such advice to sustain the jury's verdict of guilty. The trial evidence, viewed in a light most favorable to the prosecution, did not eliminate every reasonable hypothesis of the petitioner's innocence. *United States v. Ocanas, supra.* In light of the fact that the Government's own witness, Special Agent Gloekler of the criminal investigation division of the Internal Revenue Service, admitted that there "might well be" a difference of opinion between people of equal expertise, there is insufficient evidence as a matter of law to establish that petitioner is guilty of the offenses of which he now stands convicted.

II.

A new trial is warranted where there is substantial and credible evidence that the petitioner was prevented from testifying in his own behalf as a result of his trial counsel's threat to withdraw his representation if he took the stand.

The statement of the case outlines facts which make it clear that it is petitioner's contention that the only reason that he did not take the stand to testify on his own behalf was because his trial counsel threatened to withdraw if he did so. Thus, petitioner's constitutional right to counsel, as guaranteed by the Sixth Amendment, could only be retained if he relinquished his right to present evidence on his own behalf.

The present state of the law is such that there is no unanimity on the question of whether a criminal defendant has a constitutional right to testify in his own behalf. Though there are a line of cases which hold that a criminal defendant has no such constitutional right to testify, *State v. Hutchinson,* 458 S.W. 2d 553 (Mo. 1970) (en banc); *Kinder v. Commonwealth of Ky.,* 269 S.W. 2d 212 (Ky. 1954), the opposing view seems to be the prevailing one, *Alicea v. Gagnon,* 675 F. 2d 913 (7th Cir. 1982); *Ashe v. North Carolina,* 586 F. 2d 334 (4th Cir. 1978), *cert. denied,* 441 U.S. 966, 99 S. Ct. 2416, 60 L. Ed. 2d 1 (1971); *United States ex rel Wilcox v. Johnson,* 555 F. 2d 115 (3d Cir. 1977); *see Faretta v. California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

The factual situation in *United States ex rel. Wilcox v. Johnson, supra,* is analogous to that of the instant case. In *Wilcox,* the defendant indicated to his attorney that he wished to testify on his own behalf, and that his testimony was in the nature of an alibi. His attorney conferred with the trial judge, and returned to tell Mr. Wilcox that she (the trial attorney) would be permitted

to withdraw if he insisted on testifying, and that he would be required to represent himself for the remainder of the trial. The *Wilcox* court condemned this trial "tactic" on the part of defense counsel, and held that the defendant was entitled to a new trial:

> "As in Garcia, the appellee here 'was put to a Hobson's choice': decline to testify and lose the opportunity of conveying his version of the facts to the jury, or take the stand and forego his fundamental right to be assisted by counsel. The Trial Judge thus conditioned the exercise of Mr. Wilcox's statutory right to testify upon the waiver of rights guaranteed by the Constitution. This was an impermissible infringement upon the appellee's right to testify and his Sixth Amendment right to counsel.
>
> A defendant in a criminal proceeding is entitled to certain rights and protections which derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted." (*supra* at 120).

Obviously, *Wilcox* presents a factual situation where the trial judge *purportedly* made a ruling as to a defense counsel's motion to withdraw, which is not the case here. However, the chilling effect of trial counsel's threatened abandonment is virtually identical. It is submitted that assuming *arguendo* that petitioner was given such a "warning" by trial counsel, the constitutional prohibition resulting from the so-called "Hobson's choice" would be dictated by the reasoning in *Wilcox*. *Cf.*, *Wright v. Estelle*, 572 F. 2d 1071 (5th Cir. 1978) (dissenting opinion).

In *Alicea v. Gagnon, supra,* the Court of Appeals for the Seventh Circuit had the occasion to consider the constitutionality of Wisconsin's alibi-notice statute. One of the holdings that had to be arrived at before the constitutional issue could be reached was whether the defendant's "right" to testify was of constitutional proportions. After reviewing the issue from the time when defendants were actually incompetent to testify up to the present, the court concluded, "We therefore hold that a criminal defendant has a constitutional right to testify in his own behalf under the fifth, sixth, and fourteenth amendments." *supra* at 923.

By way of dicta, the Supreme Court has generally supported the *Gagnon* and *Wilcox* reasoning. In *Harris v. New York,* 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971), the Court indicated that "every criminal defendant is privileged to testify in his own defense, or to refuse to do so". *Id.* at 225. The Court carried the doctrine a step further in *Brooks v. Tennessee,* 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972), when it suggested that "whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right". *Id.* at 612. Following this line in *Farretta v. California, supra,* the Court listed a defendant's right to testify as one of several constitutional rights "essential to due process of law in a fair adversary process". *Id.* at 819, n. 15.

It is submitted that if a defendant's right to testify is a right which is constitutionally derived, then it is reversible error for that right to be tampered with by a trial attorney's threat of withdrawal if the defendant does not go along with his tactical wishes. The reputed facts of the instant case necessitate a reversal for all of the above reasons.

III.

A new trial is mandated by the denial of effective assistance of counsel where no defense testimony or evidence is offered at trial, despite the fact that (a) the petitioner insisted on testifying, (b) an expert accounting witness was interviewed and available to endorse the propriety of petitioner's tax deferred plan, and (c) numerous character witnesses could have been secured if trial counsel had chosen to utilize them.

It has already been stated, and the record establishes conclusively, that trial counsel made no attempt to put on a defense for petitioner despite the fact that there was testimony and evidence available. That fact, standing alone, does not render counsel ineffective as a matter of law. However, within the context of petitioner's trial, there appears to be no reason why the various witnesses were not called. Since there was no testimony, their testimony could not possibly have been cumulative. There doesn't seem to be any way that petitioner could have been prejudiced by testimony that his tax theory was supported by other experts or testimony attesting to his good character.

It is well established that where a criminal defendant raises allegations of ineffective assistance of counsel, "(T)he standard of adequacy of legal services, as in any other profession, is the exercise of the customary skill and knowledge which normally prevails at that time and place". *Moore v. United States*, 432 F. 2d 730, 736 (3d Cir. 1970) (en banc). Furthermore, even if the defendant can demonstrate incompetency, he must also shoulder the burden of proof in establishing a substantial prejudice as a by-product of the breach of duty. *United States v. Defalco*, 644 F. 2d 132, 135 (3d Cir. 1979).

Even with this substantial burden, it is submitted that, as a matter of law, ineffective assistance of counsel is established

where the defendant is precluded from putting on an available defense and forced to defend himself solely on the basis of inconsistencies and defects in the Government's case. The prejudice to petitioner, in such a situation, is glaringly obvious, and constitutes grounds for a new trial.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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